In The

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
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GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Petitioners,

-against-

JAMES H. TULLY, JR., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of the Case

The Proceedings Below

Petitioners appealed to the United States Court of Appeals, Second Circuit, from an order and judgment of the United States District Court for the Northern District of New York (James T. FOLEY, D.J.), entered on November 14, 1975, which denied petitioners' motion to convene a three-judge court in this action and granted the motion by respondents to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Court of Appeals affirmed the order of the District Court on the opinion thereat.

Statement of Facts

Petitioners are all presently employed by the New York State Department of Taxation and Finance as Excise Tax Investigators, a position in the competitive class.

Prior to their present employment, petitioners were employed by the Police Department of the City of New York. They have all retired from that service, and are receiving pensions from the Police Department Pension Fund.

Each of the petitioners was, subsequent to his retirement, appointed to State service from an eligible list resulting from successful completion of a competitive examination. However, in order to permit their employment without suspension or diminution of their City pensions, they were appointed under the authority of Retirement and Social Security Law, Article 7, § 211, which relates to the re-employment of retired public employees. Because of the conditions imposed on such appointments under section 211, they are subject to review at two-year intervals.

Failure to meet the conditions imposed by section 211 on periodic review will result in the loss of section 211 status; it does not result in the termination of a person appointed thereunder, but only serves to make the appointee subject to other laws (Civil Service Law, § 150, New York City Charter, § 1117) which require the suspension of pensions upon accepting other public employment in New York State.

Petitioners are presently subject to review of their section 211 status. They complain that if they fail to meet the conditions

for continuance of that status, they will be compelled to choose between the suspension of their City pensions and the relinquishment of their State appointments.

Petitioners also complain that, as re-employed pensioners, they are precluded from acquiring membership in the New York State Employees' Retirement System by the provisions of Retirement and Social Security Law, § 40, subd. (e) and § 213. Subdivision (c) (9) of section 40 authorizes the membership of an employee retired under any other public retirement system, provided pension benefits payable under that system are suspended during his active membership in the system.

Opinion Below

The memorandum-decision and order by Hon. James T. FOLEY, Chief Judge, Northern District of New York, is set forth in the Appendix to the petition for certiorari.

The Court held, in substance, that the pensions earned by petitioners in their New York City employment had been conditioned, from the inception of such employment, by the limitations on post-retirement employment of which they now complain; that such limitations are common in public pension systems, including the Federal, and are not unreasonable.

Questions Presented

1. Do the provisions of New York Retirement and Social Security Law, § § 40 (e) and 211 through 216 inclusive, which authorize the re-employment in public service of retired public pensioners under certain conditions without suspension of their pension payments, but upon such re-employment, do not permit them to join the appropriate pension system, constitute a statutory impairment of petitioners' contractual rights?

The Courts below held that they do not.

2. Did petitioners have, at any time, a vested contractual right to re-enter public employment without suspension of their pension payments or, without suspension of payments, to rejoin the pension system?

The Courts below held that they did not.

3. Do the provisions of law aforesaid deprive petitioners of equal protection of the laws?

The Courts below held that they do not.

Reasons for Denying Certiorari

Section 1117 of the New York City Charter provides as follows:

> "§ 1117. Pensioner not to hold office. — If a person receiving a pension or a retirement allowance made up of such pension and an annuity purchased by the pensioner from the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, shall hold and receive any compensation from any office, employment or position under the state or city or any of the counties included within the city or any municipal corporation or political subdivision of the state, except the offices of inspector of election, poll clerk or ballot clerk under the election law or commissioner of deeds or notory public or jury duty, the payment of said pension only shall be suspended and forfeited during and for the time he shall hold and receive compensation from such office, position or employment; but this section shall not apply where the pension and the salary or compensation of the office, employment or position amount in the aggregate to less than one thousand eight hundred dollars annually. (Derived from former § 897 as amended by L. 1945, ch. 630, L. 1949, ch. 606, L. 1949, ch. 642, L. 1952, ch. 645.)"

Much to the same effect, but with an important exception, New York State Civil Service Law, § 150 provides:

> "§ 150. Suspension of pension and annuity during public employment
>
> "*Except as otherwise provided by sections one hundred one, two hundred eleven, and two hundred twelve of the retirement and social security law*, section five hundred three of the education law, and except as now provided by any local law or charter, if any person subsequent to his retirement from the civil service of the state or of any municipal corporation or political subdivision of the state, shall accept any office, position or employment in the civil service of the state or of any municipal corporation or political subdivision of the state to which any salary or emolument is attached, except jury duty or the office of inspector of election, poll clerk or ballot clerk under the election law, or the office of notary public or commissioner of deeds, or an elective public office, any pension or annuity awarded or allotted to him upon retirement, and payable by the state, by such municipal corporation or political subdivision, or out of any fund established by or pursuant to law, shall be suspended during such service or employment and while such person is receiving any salary or emolument therefor except reimbursement for traveling expenses." (Emphasis supplied.)

Thus, it can be seen that the City Charter requires the suspension of pension benefits payable to a City retiree who undertakes employment, for compensation in excess of $1800 per annum, with the State or any municipal corporation or political subdivision within the State, for the duration of such employment. Similarly, the Civil Service Law, § 150, requires the suspension of pension benefits to any retiree who accepts employment in any public office in the State, a municipality or a political subdivision, *except* as provided in Retirement and Social Security Law, § § 211 and 212, among others, for those who qualify and continue to qualify under those sections.

It should be obvious, therefore, that in fact the statutes which petitioners claim deprive them of their pensions actually permit them to retain such pension upon re-employment under appropriate conditions other provisions of State law and local charter to the contrary notwithstanding.

A.

Section 211 provides in substance that notwithstanding the provisions of other laws, or *of any local law or charter (e.g.*, New York City Charter § 1117) a retired person may be re-employed in the public service without diminution or suspension of his retirement allowance, under certain conditions. These conditions are:

> (1) that the annual compensation in his new position does not exceed the difference between his highest former salary and his maximum annual pension *(i.e.*, without optional modification);
>
> (2) that he is not employed in the service of his former employer, and
>
> (3) that, in the case of employment in State service, he obtain the approval of the State Civil Service Commission.

The approval of the Civil Service Commission, or other appropriate body or officer under § 211 (2)(a) may be granted only upon written request of the prospective employer which shows (a) that the employee is qualified, competent and fit, (b) that there is a need for his services, (c) that there are not readily available other persons qualified to perform the duties of the position and (d) that his employment is in the best interest of the government service.

Presumably, petitioners fulfilled all of those conditions, to the satisfaction of the Civil Service Commission, at the time of their respective appointments. Approvals given under § 211 are subject, however, to review every two years.

At the time of their respective appointments, petitioners embraced the provisions and conditions of § 211 as working to their benefit. Were it not for sections 211 and 212, petitioners could still have been employed by the State of New York but, by virtue of City Charter, § 1117 and Civil Service Law, § 150, they would have had to waive their City pensions. In short, Retirement and Social Security Law, Article 7, which petitioners now attack, did not prevent their employment by the State, but rather made it possible without loss of their pensions. Thus, petitioners' contention that sections 211, *et seq.* operate to terminate petitioners' employment and thereby deprive them of money and property without due process, is invalid on its face, and in fact, is contrary to the actual effect of those sections.

B.

Petitioners further contend that there is no legal justification for depriving them of their City pensions, in which they allege a "vested right". As demonstrated above, the suspension of petitioners' pensions upon re-employment is mandated by City Charter, § 1117 and Civil Service Law, § 150, which are not under attack in this case. In any event, those sections have been sustained against constitutional attack in an impressive array of decisions by New York State courts. These include:

Matter of Bachow v. *Kowal,* 39 N.Y. Misc 2d 439 (Sup. Ct., New York Co., 1945).

Fay v. *O'Brien,* 195 N.Y. Misc. 865, affd. 300 N.Y. 750 (1950);

(Matter of Goodell v. *Walsh,* 185 Nemfork Misc. 897 (Sup. Ct., New York Co., 1945).

Jones v. *Valentine,* 164 N.Y. Misc. 443, affd. 276 N.Y. 585 (1937);

Cox v. McElligott, 163 N.Y. Misc. 619, affd. 276 N.Y. 604 (1937);

See also, *Breithut v. Teachers' Retirement Board,* 296 N.Y. 1031 (1947);

162 A.L.R. 1469.

As the foregoing Nemfork decisions have held, "(A) municipal corporation has the right to prescribe the conditions upon which a pension shall be forfeited and its provisions are binding upon the pensioner long before his pension becomes vested" *(Matter of Fay* v. *O'Brien, supra,* 195 N.Y. Misc. at 867). Accordingly, petitioners never had a vested interest in the continuation of their pensions upon re-entry into public employment following retirement.

The benefits of public employee pensions in New York State became vested as contractual rights by virtue of Article V, § 7 of the New York State Constitution, on and after July 1, 1940. But prior to that date, such benefits were considered gratuitous, and not irrevocable *(Day* v. *Mruk,* 283 N.Y. App. Div. 233, affd. 307 N.Y. 349 (1954)). When the benefits became contractual in 1940, whatever conditions or limitations had existed in the statutory scheme on and before that date became a part of the contract thereafter *(Day* v. *Mruk, supra).* It appears that Civil Service Law § 150 (then numbered § 32) was added by Chapter 78, Laws of New York, 1932. City Charter § 1117 (formerly § 897) has been in effect since January 1, 1938 *(Breithut v. Teachers' Retirment Board, supra).* Therefore, since both of those sections ante-dated the constitutional provision vesting pension benefits, they remain as conditions on the contractual relationship *(Jones v. Valentine, supra).* In other words, the continuation of pension payments following re-entry into public employment is not a vested property right; and to the extent it is permitted by Retirement and Social Security Law, § 211, it is subject to the conditions imposed by that section.

Petitioners claim further in that they have a property right in their present State positions, of which they cannot be deprived without due process presumably, a hearing. Whether they are being deprived of State employment, or merely their pensions is

arguable. But since they accepted State employment under the conditions imposed by § 211 *et seq.*, they cannot claim an unlimited property right in those positions. In *Arnett v. Kennedy* (416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)) the Court's decision (per REHNQUIST, J.) held that an employee undertaking Federal employment under the Lloyd-LaFollette Act accepted his appointment subject to the removal provisions of the Act, and hence, had no greater rights to due process. Justice REHNQUIST also noted, in *Arnett*, the Court's "skeptical" view of a litigant challenging the constitutionality of a statute under which he has simultaneously claimed benefits, citing *Fahey v. Malonee* (332 U.S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947)).

Petitioners also attack the provisions of Retirement and Social Security Law, § § 40 (e) and 213 (a), which prohibit a retired public employee, upon re-entry into public service, from becoming a member of the State Retirement System. They overlook the provisions of § 40 (c) (9) of that law, which expressly authorizes such membership conditioned upon suspension of the pension. Once again, the condition is reasonable and justifiable, as the Courts below found.

C.

Under the statutory scheme, therefore, petitioners are not prevented from being employed by the State of New York, and are not prohibited absolutely from membership thereafter in the State Employees' Retirement System. As a consequence of such employment and membership, however, they may be virtue of *other statutes* be required to accept the suspension of their City pensions.

In addition, § § 211 and 212 actually permit re-entry into public service without loss of pension benefits, under certain circumstances, provided a need for the services is demonstrated and continues. Only in that case where such re-employment without loss of pension occurs by virtue of section 213 is there a limitation on the right to join a second retirement system.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Dated: August 30, 1976

Respectfully submitted,

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